Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–205 OF 1997
ABDUL MALIK ISHAK J
12 FEBRUARY 1998

Civil Procedure *— Pleadings — Parties to action bound by own pleadings — Application for summary judgment — Plaintiff in statement of claim pleaded breach of copyright in literary works — Affidavit included breach of artistic copyright — Whether plaintiff could claim infringement of artistic copyright*

Civil Procedure *— Summary judgment — Triable issues raised — Matters peculiarly within plaintiff's knowledge — Defendant prejudiced in being unable to assess evidence — Counterclaim by defendant — Whether there should be a full trial — Rules of the High Court 1980 O 14 r 3(1)*

The plaintiff was a locally incorporated company and a popular and well known manufacturer of consumer products. The plaintiff manufactured, distributed, marketed and sold various consumer products in particular floor cleaner products known as 'Super Active Kleen Floor'. The defendant, on the other hand, was also a locally incorporated company dealing in consumer products and sold their floor cleaner products through their agents, distributors, retailers and licensees under the brand name 'Leo'. The plaintiff applied for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') against the defendant for infringement of the plaintiff's copyright under the Copyright Act 1987. The plaintiff pleaded and sought relief in their statement of claim for alleged breach of their copyright in the literary works in the label. The plaintiff extended this claim to cover their alleged copyright in the artistic works in the label as well, which was beyond the plaintiff's statement of claim.

Counsel for the plaintiff submitted that from the pleadings and the affidavits filed, it was apparent that the nature of the defendant's defence was one of bare denial and devoid of positive averments. The defendant had put in issue the plaintiff's ownership of the copyright in the label and the eligibility of the label for copyright protection. The defendant further contended that there were triable issues that could not be dismissed summarily.

Held, dismissing the plaintiff's application:

(1) A plaintiff cannot in proceedings for summary judgment include in his summons in chambers and affidavit in support matters which extend beyond his statement of claim. The purpose of an affidavit in support of the application for summary judgment is merely to verify the facts upon which the claim is based. It cannot in law enlarge the same. Order 14 r 2(1) of the RHC provides that the application for summary judgment is to be supported by an affidavit verifying the facts upon which the claim to which the application relates. As such, the plaintiff was precluded from claiming artistic copyright in the label and the

infringement thereof by the defendant as this had not been pleaded in the statement of claim (see pp 43I and 44A–C).

(2) The defendant's affidavit evidence was not lacking and the defence was fit to be tried before this court. Further, there was a counterclaim filed by the defendant. The averments that the label contained artistic and literary works which are original and genuine and that sufficient effort, time, skill, energy and labour had been put in were mere assertions unsupported by particulars and evidence. A full trial would enable the court to make a finding of facts and assess the evidence in its totality (see p 51B, F–G).

(3) Order 14 r 3(1) of the RHC provides that summary judgment is to be refused where the court is satisfied that 'there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim'. In the present case, there were triable issues that would hinder the plaintiff's application for summary judgment. Upon scrutiny of the affidavits, it was obvious that the defendant was severely disadvantaged in not being able to assess the evidence which the plaintiff had placed before this court. This was a fit case for a full trial. Interrogatories, discovery and cross-examination would be made available once the case goes for trial but would be totally shut out if there was summary judgment (see pp 44F, 53G–H and 54C).

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat tempatan dan merupakan pengilang yang terkenal serta popular bagi barangan konsumer. Plaintif mengilang, mengedar, memasarkan dan menjual pelbagai produk konsumer khususnya produk pembersih lantai yang dikenali sebagai 'Super Active Kleen Floor'. Sebaliknya, defendan adalah juga sebuah syarikat tempatan yang berurusan dengan produk konsumer dan menjual produk pembersih lantai mereka melalui ejen-ejen, pengedar, peruncit dan pemegang lesennya di bawah jenama 'Leo'. Plaintif telah memohon untuk mendapatkan penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap defendan bagi pelanggaran hakcipta plaintif di bawah Akta Hakcipta 1987. Plaintif telah memplid dan cuba mendapatkan relief dalam pernyataan tuntutan mereka bagi kemungkiran yang dikatakan akan hakcipta mereka dalam karya sastera pada labelnya. Plaintif telah melanjutkan tuntutan ini untuk meliputi hakciptanya yang dikatakan dalam karya seni dalam label tersebut juga, yang mana adalah di luar pernyataan tuntutan plaintif.

Peguam plaintif berhujah bahawa daripada pliding dan afidavit yang telah difailkan, adalah jelas bahawa sifat pembelaan defendan adalah penafian semata-mata dan tidak mempunyai penegasan positif. Defendan telah menjadikan isu keempunyaan hakcipta plaintif dalam label tersebut dan kelayakan label tersebut untuk perlindungan hakcipta. Defendan selanjutnya berhujah bahawa terdapatnya isu-isu yang boleh dibicarakan yang tidak boleh ditolak secara terus.

Diputuskan, menolak permohonan plaintif: A

(1) Plaintif tidak boleh dalam prosiding untuk penghakiman terus memasukkan dalam saman dalam kamar dan afidavit sokongannya perkara-perkara yang melampaui pernyataan tuntutannya. Tujuan sesuatu afidavit sokongan bagi permohonan untuk penghakiman terus adalah semata-mata untuk menentusahkan fakta-fakta di B atas yang mana tuntutan tersebut diasaskan. Ia tidak boleh di sisi undang-undang memperbesar-besarkannya. Aturan 14 k 2(1) KMT memperuntukkan bahawa permohonan untuk penghakiman terus haruslah disokong oleh suatu afidavit yang menentusahkan fakta-fakta di atas yang mana tuntutan kepada permohonan itu mempunyai kaitan. Oleh yang demikian, plaintif C adalah terhalang daripada menuntut hakcipta seni dalam label tersebut dan perlanggarannya oleh defendan kerana perkara ini telah tidak diplidkan dalam pernyataan tuntutan (lihat ms 43I dan 44A–C).

(2) Keterangan afidavit defendan mencukupi dan pembelaannya D sesuai untuk dibicarakan di hadapan mahkamah ini. Selanjutnya, terdapat tuntutan balas yang difailkan oleh defendan. Penegasan-penegasan bahawa label tersebut mengandungi kerja-kerja seni dan karya yang mana adalah tulen dan asli dan bahawa usaha, masa, kemahiran, dan tenaga yang mencukupi telah dihabiskan E adalah hanya merupakan penegasan-penegasan yang tidak disokong oleh butir-butir dan keterangan. Suatu perbicaraan penuh akan membolehkan mahkamah membuat suatu keputusan fakta-fakta dan mentaksirkan keterangan secara keseluruhannya (lihat ms 51B, F–G).

(3) Aturan 14 k 3(1) KMT memperuntukkan bahawa penghakiman F terus hendaklah ditolak di mana mahkamah berpuas hati bahawa 'ada isu atau soalan yang dipertikaikan yang patut dibicarakan atau kerana sesuatu sebab yang lain patut diadakan perbicaraan mengenai tuntutan'. Dalam kes ini, terdapat isu-isu yang boleh dibicarakan yang akan menghalang permohonan plaintif untuk G penghakiman terus. Setelah meneliti afidavit-afidavit tersebut, adalah jelas bahawa defendan terjejas dengan teruknya dalam tidak dapat menaksirkan keterangan yang plaintif telah kemukakan di hadapan mahkamah ini. Ini merupakan kes yang amat sesuai untuk perbicaraan penuh. Interogatori-interogatori, penzahiran dan pemeriksaan balas akan tersedia sebaik sahaja kes tersebut H diperbicarakan tetapi akan dinafikan sepenuhnya jika terdapatnya penghakiman terus (lihat ms 44F, 53G–H dan 54C).]

Notes

I

For a case on parties to action bound by own pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2631.

For cases on triable issues raised in summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3479–3484.

Cases referred to

Attorney-General v Newspaper Publishing [1987] 3 All ER 276 (refd)
Baily v Taylor (1829) 1 Russ & M 73 (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
British Broadcasting Co v Wireless League Gazette Publishing Co [1926] Ch 433 (refd)
Byrne v Statist [1914] 1 KB 622 (refd)
Chelsea Man Menswear v Chelsea Girl (No 2) [1988] FSR 217 (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 (refd)
Collins v Cater (1898) 78 LT 613 (refd)
Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd [1990] 3 MLJ 1(refd)
Delfe v Delamotte (1857) 3 K & J 581 (refd)
Elanco Products Ltd & Anor v Mandops (Agrochemical Specialists) Ltd & Anor [1979] FSR 46 (refd)
Errabhadrarao v Sharma AIR 1960 AP 45 (refd)
Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196 (refd)
Football League Ltd v Littlewoods Pools Ltd [1959] Ch 637 (refd)
Grimson v Eyre (1804) 9 Ves 341 (refd)
H Blacklock & Co Ltd v C Arthur Pearson Ltd [1915] 2 Ch 376 (refd)
Hogg v Kirby (1803) 8 Ves 215 (refd)
House of Spring Gardens Ltd v Point Blank Ltd [1985] FSR 327 (refd)
Interlego AG v Tyco Industries Inc & Ors [1989] 1 AC 217 (refd)
Kelly v Hooper (1840) 4 Jur 21 (refd)
Koh Siak Poo v Perkayuan OKS Sdn Bhd [1988] 3 MLJ 224 (refd)
LB (Plastics) v Swish Products (1979) RPC 551 (refd)
Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 273 (refd)
Lever v Goodwin (1887) 36 Ch D 1 (refd)
Longman Malaysia Sdn Bhd v Pustaka Delta Pelajaran Sdn Bhd [1987] 2 MLJ 359 (refd)
Macmillan & Co Ltd v Cooper (1923–1924) 40 LT 186 (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)
Marengo v Daily Sketch & Sunday Graphic Ltd [1948] 1 All ER 406 (refd)
Miles v Bull [1968] 3 All ER 632 (refd)
Morris v Gilman (1943) 60 RPC 20 (refd)
My Kinda Town v Soll & Grunts Investments [1983] RPC 15 (refd)
Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd [1980] 2 MLJ 83 (refd)
Overseas-Chinese Banking Corp Ltd v Banhenly Holdings Sdn Bhd & Ors [1993] 2 CLJ 347 (refd)
PA Thomas & Co v Mould & Ors [1968] 2 QB 913 (refd)
Peter Pan Mfg Corp Ltd v Corsets Silhouette [1963] 3 All ER 402 (refd)
Portway Press v Haque [1957] RPC 426 (refd)
Potton Ltd v Yorkclose Ltd [1990] FSR 11 (refd)
Purefoy Engineering Co v Sykes Boxall & Co (1955) 72 RPC 89 (refd)

Ravenscroft v Herbert & New English Library Ltd (1980) RPC 193 (distd) A
Redland Bricks Ltd v Morris & Anor [1970] AC 652 (refd)
SM Appaduray & Anor v R Ananda [1982] 1 MLJ 292 (refd)
Seager v Copydex [1967] 2 All ER 415 (refd)
Seaward v Paterson [1897] 1 Ch 545 (refd)
Sheriff v Coates (1830) 1 Russ & M 159 (refd)
United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd) B
University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601 (refd)
Van Camp Chocolates Ltd v Aulesebrooks Ltd [1984] 1 NZLR 354 (refd)
Walter v Lane [1900] AC 539 (refd) C
Weatherby & Sons v International Horse Agency & Exchange Ltd [1910] 2 Ch 297 (refd)

Legislation referred to

Copyright Act 1987 ss 3, 7, 8, 13(1), 26(2)(a), 36(1), 42 D
Rules of the High Court 1980 O 14 rr 2(1), 3(1), O 24, O 25, O 26

Alex PC Kok (*Shearn Delamore & Co*) for the plaintiff.
Ooi Huey Ling (*Cheang & Ariff*) for the defendant.

Abdul Malik Ishak J: This was the plaintiff's application for summary E judgment in encl 9 dated 24 October 1997 under O 14 of the Rules of the High Court 1980 ('the RHC') against the defendant for infringement of the plaintiff's copyright in respect of artistic and literary works under the Copyright Act 1987.

Enclosure 9 was filed on 29 October 1997 and it was supported by an F affidavit of Gan Lee Beng that was affirmed on 24 October 1997 and filed on 29 October 1997 as reflected in encl 8. The defendant through Loi Tuan Ee affirmed an affidavit on 6 December 1997 in encl 19 to rebut encl 8. The plaintiff through Gan Lee Beng in encl 18 affirmed an affidavit in reply on 12 December 1997 which was filed on 16 December 1997 to G counter encl 19. The plaintiff's writ of summons and the Statement of claim in encl 2 were filed on 2 August 1997 while the defendant entered their memorandum of appearance in encl 4 on 22 October 1997 which was filed on 24 October 1997. The defendant filed their statement of defence and counterclaim as per encl 11 on 12 November 1997.

It is apparent that the plaintiff filed their O 14 application after the H defendant had entered their appearance and before the filing of the statement of defence and counterclaim.

The plaintiff is a locally incorporated company and a popular and well known manufacturer of consumer products. For the purpose of the present exercise, the plaintiff manufactured, distributed, marketed and sold various I consumer products in particular floor cleaner products known as 'Super Active Kleen Floor'. The defendant, on the other hand, is also a locally incorporated company dealing in consumer products and sold their floor cleaner products either through its agents, distributors, retailers and its licensees under the brand name 'Leo'.

By way of a summary, the plaintiff sought for the following prayers in encl 9:

(a) An injunction against the defendant preventing the defendant from infringing the plaintiff's copyright in the artistic and literary works on the back label of its 'Kiwi Super Active Kleen Floor' ('the label') by manufacturing, distributing, stocking, selling and/or offering for sale without the plaintiff's consent or permission the said artistic and literary works or any substantial part thereof in any material form whatsoever as more particularly set forth in para (1) of encl 9.

(b) An enquiry as to damages including aggravated damages for the defendant's infringement of the plaintiff's copyright aforesaid and payment to the plaintiff of all such sums found due and payable with interest thereon after such inquiry.

(c) As an alternative to prayer (b), an account of profits of all sums received by the defendant in respect of the said infringement and payment thereof to the plaintiff of all sums found due upon taking such account.

(d) For the delivery up and disclosure by the defendant and/or destruction on oath of all the defendant's infringing works and labels which are identical or substantial reproduction of the plaintiff's copyrighted literary works particularized in para 4 of encl 9.

(e) An order for full discovery of document as particularized in para 5 of encl 9.

(f) An order that the defendant do cause to be published a public apology in five national newspapers of the plaintiff's choice at the defendant's own expense on such terms and conditions to be approved by the plaintiff.

(g) That the costs to be borne by the defendant.

The affidavit of Gan Lee Beng in encl 8 revealed that the plaintiff hinged their case for an O 14 application against the defendant for breach of copyright in the artistic and literary works in the label. Whereas in the statement of claim the plaintiff alleged breach of copyright in the literary works comprised in the label. It would therefore be apparent that the reliefs sought by the plaintiff as reflected in encl 8 and the grounds upon which they were based were wider than what was pleaded in the statement of claim. The plaintiff pleaded and sought relief in their statement of claim for alleged breach of its copyright in the literary works in the label. Surprisingly, by encl 9 the plaintiff extends this claim to cover its alleged copyright in the artistic works in the label as well. Bluntly put, encls 8 and 9 extended too far — beyond the plaintiff's statement of claim. It is now trite law that a plaintiff cannot in proceedings for summary judgment include in his summons in chambers and affidavit in support matters which extend beyond his statement of claim. It is obvious that the purpose of an affidavit in support of the application for summary judgment is merely to verify the facts upon which the claim is based. It cannot in law enlarge the same. Order 14 r 2(1) of the RHC provides that the application for summary judgment is to be supported by an affidavit verifying the facts

upon which the claim to which the application relates. As Raja Azlan Shah Ag LP (as his Majesty then was) observed in *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206, especially at p 207:

> ... we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co v Parr* [1892] 2 QB 14 where Mathew J said that 'it is most important that a defendant should know from the writ what the exact claim against him is'.

It is my judgment and I so hold that the plaintiff was precluded from claiming artistic copyright in the label and the infringement thereof by the defendant as this had not been pleaded in the statement of claim — either in the body of or in the prayers of the same. Miss Ooi Huey Ling, learned counsel for the defendant, rightly submitted that the plaintiff's claim of artistic copyright and derivative works under s 8 of the Copyright Act 1987 far exceeded the boundaries of the plaintiff's claim and ought to be disregarded. I wholeheartedly agree with her and I so hold accordingly.

The principles of summary judgment

Summary judgment is only given in a plain and obvious case. Raja Azlan Shah CJ (Malaya) (as his Majesty then was) in the case of *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196, particularly at p 199 aptly said:

> An O 14 order in the view we have always taken of it is a very stringent procedure because it shuts the door of the court to the defendant. The jurisdiction ought only to be exercised in proper cases.

Order 14 r 3(1) of the RHC in strong language provides that summary judgment is to be refused where the court is satisfied that: 'there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim'.

The phrase 'there ought for some other reason to be a trial' was inserted in O 14 r 3(1) of the RHC to bring and ensure that justice is done to all parties. Megarry J in *Miles v Bull* [1968] 3 All ER 632 especially at p 637 of the report had this to say of that phrase:

> These last words seem to me to be very wide. They also seem to have special significance where (as here) most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff.

In *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 3 MLJ 1, the court there held that the circumstances and audacity with which the fraud was carried out and the absence of an explanation by

A the directors of the plaintiffs constitute 'some other reason' for a trial in terms of O 14 r 3(1) of the RHC.

Richard Talalla J in *Overseas-Chinese Banking Corp Ltd v Banhenly Holdings Sdn Bhd & Ors* [1993] 2 CLJ 347 at p 350 remarked:

> B As I see it, O 14 r 3(1) of the Rules of the High Court 1980 provides for leave to defend to be given in the application for summary judgment where there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. I have in mind the case [of] *Miles v Bull* [1969] 1 QB 258 where Megarry J said in regard to the last words of the subrule that they seemed to him to be very wide and to have special significance where, as in that case, most or all of the relevant facts were C under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which would aid the defendant.

So much for the law.

D *Copyright of the literary works*

This judgment will confine itself to the copyright of the literary works of the label as claimed by the plaintiff. The plaintiff in order to succeed in a claim based on copyright must prove:

E (a) that the works in question are eligible for and/or attract copyright protection under the Copyright Act 1987; and

(b) that the plaintiff is the owner of the copyright as claimed.

Generally, s 7 of the Copyright Act 1987 deals with the eligibility for copyright protection and it enacts as follows:

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(1) Subject to this section, the following works shall be eligible for copyright:

(a) literary works;

(b) musical works;

(c) artistic works;

G (d) films;

(e) sound recording; and

(f) broadcasts.

(2) Works shall be protected irrespective of their quality and the purpose for which they were created.

H (3) A literary, musical or artistic work shall not be eligible for copyright unless —

(a) sufficient effort has been expended to make the work original in character; and

(b) the work has been written down, recorded or otherwise reduced to material form.

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(4) A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work involves an infringement of copyright in some other work.

Section 7(3)(a) of the Copyright Act 1987 prescribes in clear language that a literary work shall not be eligible for copyright unless, inter alia,

sufficient effort has been expended to make the work original in character. It seems that copyright subsists only in an original literary work as envisaged under s 7(3)(a) of the Copyright Act 1987. Volume 9 of *Halsbury's Laws of England* (4th Ed) at para 831 expresses an opinion that it is not necessary that 'the work should be the expression of original or inventive thought, for Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of a literary work, with the expression of thought in print or writing'. Support for this novel proposition can easily be found in the following anthology of authorities:

(i) *University of London Press Ltd v University Tutorial Press & Ors* [1916] 2 Ch 601 at p 608;

(ii) *Fraser v Evans* [1969] 1 All ER 8 at p 12;

(iii) *Anand v Delux Films* AIR 1978 SC 1613 at p 1618;

(iv) *Misra Bandhu Karyalaya v Shivaratanlal Koshal* AIR 1970 MP 261; and

(v) *Fateh Singh Mehta v Singhal* (1990) 1 PLR 69 (Rajasthan).

The word 'original' that appears in s 7(3)(a) of the Copyright Act 1987 does not mean that the work must be the expression of original or inventive thought. I am of the considered view that the originality which is required relates to the expression of the thought; it does not require that the expression must be in an original or even novel form. The work must not be copied from another work. It should originate from the author. Lord Reid in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at pp 277–278 in lucid terms said:

> What is the precise amount of the knowledge, labour, judgment or literary skill or taste, which the author of any book must bestow in order to acquire copyright, cannot be defined in precise terms. In every case, it must depend largely on the special facts of that case, and must in each case, be very much a question of degree.

It is a correct statement of the law to say and I so say that no originality of thought is needed to sustain a claim to copyright. Under the prevailing copyright law, ideas are not protected. The skill and labour needed to give any given idea some particular material form, and it is that form in which the work is presented that is protected by copyright. It is this kind of originality in which the author can claim to be his own work that is protected under the copyright law. As was said by the court in *LB (Plastics) v Swish Products* [1979] RPC 551 at p 567 that two compilers covering the same area may produce identical, or nearly identical street directories; two artists or photographers photographing a particular object may produce nearly identical representations, but each is entitled to copyright in his particular representation of the work in question. An interesting proposition of law was expounded in *Macmillan & Co Ltd v Cooper* (1923–1924) 40 LT 186 to this effect, that any new and original plan, arrangement or compilation of material will entitle the author to copyright therein, and this would be so irrespective of whether the materials themselves are old or new. Whoever by his own skill, labour and judgment writes a new work

may have a copyright thereto unless it is directly copied or evasively imitated from another work. In *Errabhadrarao v Sharma* AIR 1960 AP 45, it was held that an original composition was not meant to convey that it was confined to a field which hitherto had not been traversed by any person or persons, whether it be in respect of ideas or materials comprised thereto. What is pertinent to note is that the originality which is required relates to the expression of thought, and that the work should not be copied from another work, but rather it should originate from the author. In my judgment, the degree of originality required for literary work for the purpose of copyright protection is very minimal. This would certainly reduce the element of subjective judgment in determining:

(1) what work qualifies for protection; and

(2) whether protection ought to be given to a person who expends labour, skill, judgment and capital in producing the work (in this connection reference to a textbook entitled *Intellectual Property* by Cornish (2nd Ed) at p 270 is greatly recommended).

Perhaps it is not out of place to say that in other jurisdictions certain works received protection of the courts. Only four authorities need to be cited. The court in *Walter v Lane* [1900] AC 539 protected the report of a speech; in *Morris v Gilman* (1943) 60 RPC 20 the court gave protection to a sketch of a piece of machinery; in *Byrne v Statist* [1914] 1 KB 622 the court protected the translation of a foreign work and finally, in *Portway Press v Haque* [1957] RPC 426 interestingly, the court gave protection to an information service to racegoers.

The plaintiff claimed copyright of its label as 'literary works' by relying on s 3 of the Copyright Act 1987 where 'literary works' was said to include (the relevant parts):

> (a) ... pamphlets ... and other writings;
>
> (g) ... compilations expressed in words, figures or symbols (whether or not in a visible form).

It was emphasized that the present label contained writings, more in the nature of a compilation represented in a specific manner and style which is expressed in words, figures and symbols. In *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, Peterson J observed at p 608 of the report:

> It may be difficult to define 'literary work' as used in this Act, but it seems to be plain that it is not confined to 'literary work' in the sense in which that phrase is applied, for instance, to Meredith's novels and the writings of Robert Louis Stevenson.

Further down the same page of the same judgment, Peterson J remarked:

> In my view, the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word 'literary' seems to be used in a sense somewhat similar to the use of the word 'literary' in political or electioneering literature and refers to written or printed matter. Papers set by examiners are, in my opinion, 'literary work' within the meaning of the present Act.

Peterson J was of the view, by way of a summary of that case, that a literary work is not expected to be of high poetic standard and quality and it would be sufficient that the work is reduced to written and printed form. Flowing from this, it was ingeniously argued that the plaintiff has intellectually arranged, compiled, selected those words that appeared in the label and, consequently, it should be considered literary works.

In *Ravenscroft v Herbert & New English Library Ltd* [1980] RPC 193 especially at p 204 of the report, Brightman J had this to say:

> Copyright protects the skill and labour employed by the plaintiff in production of his work. That skill and labour embraces not only language originated and used by the plaintiff, but also such skill and labour as he has employed in selection and compilation,

and it is apparent that copyright resides in the labour, skill and judgment as the plaintiff or its agents had employed in the selection and compilation of the copyrighted works in the label and not the actual raw material itself.

In *Football League Ltd v Littlewoods Pools Ltd* [1959] Ch 637, it was held that even if the compilation of the chronological list had merely consisted of the reproduction of the clubs' fixtures lists, so that there was no element of skill and ingenuity, there was nevertheless sufficient painstaking hard work to justify a claim for copyright. As Upjohn J remarked at p 656 of the report:

> But, I would add, it involves a great deal of painstaking hard work with complete accuracy as the keynote. That was all that was required, ...

Football League Ltd merely reiterates the now entrenched principle that copyright protects compilations which may need no skill and ingenuity so long as there is effort in producing the copyrighted work. This principle appears to manifest itself in s 7(3) of the Copyright Act 1987 which merely requires that 'sufficient effort has been expended to make the work original in character'. Effort and hard work work hand in hand to make the copyrighted works protectable. As I said, compilation of works are copyrightable: *British Broadcasting Co v Wireless League Gazette Publishing Co* [1926] Ch 433 (compilation of seven advance programmes); *University of London Ltd v University Tutorial Press Ltd* (compilation of examination papers); *Walter v Lane* [1900] AC 539 at p 552 (report of public speech); *Collins v Cater* (1898) 78 LT 613 (compilation of chemists' catalogue of drugs); *H Blacklock & Co Ltd v C Arthur Pearson Ltd* [1915] 2 Ch 376 (Bradshaw's station index); and *Weatherby & Sons v International Horse Agency & Exchange Ltd* [1910] 2 Ch 297 at pp 303–304 (stud book list of mares and stallions). Astbury J in *British Broadcasting Co* had this to say at p 442 of the judgment:

> In the present case, the plaintiffs' compilation was a publication involving considerable time, skill, labour and expense, and a publication of matter solely within their knowledge. The defendants say that their publication will not compete with the plaintiffs' Radio Times. I dare say it will not compete seriously. But that is no reason why the defendants should appropriate any part of the plaintiff's work by copying it.

Continuing further in the same page of the same judgment, Astbury J had this to say:

> But even assuming that there is no copyright in an individual item programme, that would not prevent the plaintiffs from being entitled to copyright in a compilation of several advance programmes. The defendants contend that a mere compilation of non-copyright programmes, involving no further work than putting them together, cannot give copyright. The answer is that the compilation required very considerable work, and was not a mere collection of what had already been prepared.

An argument was advanced that it was not an easy task to compile the detailed instructions and information regarding the plaintiff's product. I have no opinion on this point and I do not propose to harp any further until the trial has come to an end. The manner, style and form of the words selected, used, compiled, arranged and chosen by the plaintiff are issues to be decided at the trial proper. It is also too premature to say that it was not an easy task and that much labour, effort, skill and judgment were exercised and expended in producing the label.

Yet another authority on copyright would be the case of *H Blacklock & Co Ltd v C Arthur Pearson Ltd* where Joyce J decided that the index to the numbers of Bradshaw's Guide for 1914 was not a new edition, in the sense in which that phrase was used in copyright law, of the index to Bradshaw's Guide for 1902, but was an index to a new and different work in which the plaintiffs were entitled to copyright; that the defendants had infringed the copyright of the plaintiffs; and that the plaintiffs were entitled to recover damages.

Then there is the case of *Purefoy Engineering Co v Sykes Boxall & Co* (1955) 72 RPC 89 where the court there decided that a catalogue which included pictures was copyrightable as 'literary works' as it involved a degree of skill and labour in its compilation.

Finally, in *Elanco Products Ltd & Anor v Mandops (Agrochemical Specialists) Ltd & Anor* [1979] FSR 46, Goff LJ remarked at p 52 of the report that:

> There is no copyright in information or ideas, but only in the manner of expressing them, and the compilation cases, of which there are many, on which the appellants rely, all go on their being skill and labour involved in making the compilation, as distinct from skill and labour in ascertaining information.

All these authorities are useful and they serve as useful guides to determine the triable issues in the present case. They would certainly come in handy after a full blown trial has been completed.

Now, in so far as the ownership of the copyright to the label was concerned, the plaintiff relied on s 26(2)(a) of the Copyright Act 1987 which enacts that where a work is commissioned by a person who is not the author's employer under a contract of service or apprenticeship, the copyright shall be deemed to be transferred to the person who commissioned the work subject to any agreement between the parties excluding or limiting such transfer. It was the plaintiff's stand that as the proprietor of the literary works of the label they were entitled and eligible for copyright.

The label was said to be produced in the course of commission under a contract of service. It was said that the label was produced by the plaintiff's agent during and in the course of a contract of service between the plaintiff and its agent. The plaintiff took a safe course of action by affirming a statutory declaration on 4 December 1997 pursuant to s 42 of the Copyright Act 1987 which put them on stronger footing. That statutory declaration 'shall be admissible in evidence in any proceedings ... and shall be prima facie proof of the facts contained therein'. It was deposed by Gan Lee Beng in encl 8 at paras 15 and 16 thereof that the plaintiff had not at anytime given or granted any right, licence or permission to third parties, in particular the defendant to reproduce the label in any form and to distribute copies of the labels to the public by sale, rental, lease or lending. The right to reproduce the labels in any form and to distribute copies of the labels to the public was said to be restrictive and the exclusive right belonged entirely to the plaintiff as envisaged under s 13(1) of the Copyright Act 1987. An argument was advanced that the defendant has infringed the plaintiff's copyright under the Copyright Act 1987 by committing the acts or causing others to commit the acts of distributing copies of the labels to the public by sale, rental, lease or lending without the consent, authority, permission and licence of the plaintiff within the meaning of s 36(1) of the Copyright Act 1987. Gan Lee Beng deposed in paras 22 and 23 of encl 8 to the effect that the plaintiff has on 6 May 1997 duly notified the defendant of its claim and has requested and demanded the defendant to cease committing their acts of copyright infringement in respect of the plaintiff's copyright to the label but, unfortunately, the defendant refused to oblige. It was said that the defendant proceeded, continued and persisted in its acts of committing copyright infringement. Finally, the defendant although refusing to admit its liability, had taken positive steps to cease copying the plaintiff's label.

In essence, it was the plaintiff's case that the label contained concise description of the product, detailed instructions on how the product should be used, upon what type and nature of floors it should be used and the contents of the product. The label too contained pictorial representation of the various uses of the product including environmental information. All these were said to be selectively and specially coined, compiled and arranged by the plaintiff.

Mr Alex PC Kok, learned counsel for the plaintiff, submitted that from the pleadings and the affidavits filed therein it was apparent that the nature of the defendant's defence was one of bare denial and devoid of positive averments. The most unkind cut of them all was when he submitted that the pleadings and the affidavits failed to condescend upon particulars. Mahadev Shankar JCA in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 writing for the Court of Appeal at p 367 had this to say:

> When an application is made for summary judgment under O 14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. In

A the present case, the guarantors do not appear to have appreciated this. Their affidavits merely relied on the defence they pleaded, which consists of bare denials and points of law which they could not sustain.

It was a wrong assessment of the affidavit evidence and the defence when Mr Alex PC Kok submitted that the defendant has not made up any case B which warranted a full blown trial. On the contrary, the evidence was not lacking and the defence was fit to be tried before this court. Incidentally, there was a counterclaim filed by the defendant as can be seen in encl 11 of which I do not propose to go through the rigmarole of examining them in great detail here.

C The two prong criteria, referred to in the early part of this judgment, to enable the plaintiff to succeed must surely mean that in the event the plaintiff is not the copyright owner or for that matter that the label is not eligible for copyright protection for lack of originality or for that matter that the plaintiff failed to prove breach of the alleged copyright by the defendant, then the outcome would be obvious. The plaintiff's application D for summary judgment must fall flat to the ground.

By way of a summary, the available evidence before the court would be as follows:

(1) The plaintiff claims ownership in the literary copyright in the label by a simple act of having commissioned the preparation of the label to E Tom Graphic Studio.

(2) The plaintiff claims that the label attracts copyright being literary works within the meaning of s 7 of the Copyright Act 1987.

Briefly by way of a rebuttal, the defendant submitted through Miss Ooi Huey Ling that the plaintiff has not set out all the relevant facts and F evidence to satisfy the court of the legitimacy of its claims.

Indeed the averments in paras 7, 9, 10 and 11 of encl 8 that the label contains artistic and literary works which are original and genuine and that sufficient effort, time, skill, energy and labour have been put in are mere assertions unsupported by particulars and evidence. A full blown trial G would enable the court to make a finding of fact and assess the evidence in its totality. An assertion of originality by way of an affidavit evidence in copyright cases is to say the least insufficient. It is germane, at this juncture, to reproduce in its original text paras 7, 9 and 10 of encl 8 in order to appreciate the difficulty faced by this court:

H 7 ... label-label depan dan belakang pencuci lantai plaintif mempunyai karya seni dan sastera yang asli dan tulen ... .

9 Secara khususnya, saya ingin mengatakan bahawa label belakang pencuci lantai plaintif 'Super Active Kleen Floor' mempunyai karya seni dan sastera yang asli dan tulen.

I 10 Seterusnya, saya menyatakan bahawa usaha-usaha giat, gigih dan kemahiran yang mencukupi telah digunakan dan dilakukan untuk mencipta dan mengeluar serta menjadikan karya-karya seni dan sastera label belakang pencuci plaintif bersifat asli .... Banyak masa dan tenaga juga digunakan untuk memastikan bahawa teks, karya seni dan sastera tersebut adalah tepat dan paling jelas dalam menerangkan serta menghuraikan produk tersendiri plaintif, iaitu 'Super Active Kleen Floor'.

In my judgment, the plaintiff's assertions that the label is original, genuine and that sufficient effort have been expended in its production is singularly lacking in its empirical evidence or particulars to support the same. A full trial should do the trick and there should not be any short circuit in a complex case of this nature. The plaintiff, for instance, does not say how much actual time was expended on the label or what was the nature of the effort that was put in. It is interesting to note that from exh GLB4 of encl 8, the costs of the works done by Tom Graphic Studio is a mere paltry sum of RM1,919.15 for both the front and back labels. Enclosure 8 was silent and it did not describe the nature of the brief given to Tom Graphic Studio or the scope of the works under the alleged commissioning. Exhibit GLB1 of encl 8 shows that the plaintiff's holding company is Sara Lee-Kiwi Holdings in USA and royalties are paid to related companies. These royalties could be paid in respect of any copyright in the label especially the products produced by the plantiff with the permission of this holding company. A pertinent question flows from exh GLB1 of encl 8. It is this: whether the plaintiff is truly the owner of the copyright in the label? Again a pertinent question to pose would be this: If the design of the label had already been supplied or designed elsewhere, what was Tom Graphic Studio's scope of works? It is now trite law that there can be no copyright in mere copying or transcribing. In an appeal from the Court of Appeal of Hong Kong, the Privy Council in *Interlego AG v Tyco Industries Inc & Ors* [1989] 1 AC 217 reversed in part the decision of the Court of Appeal of Hong Kong. Lord Oliver of Aylmerton delivering the judgment of the Privy Council at p 263 had this to say:

> That may well be right, for there is no more reason for denying originality to the depiction of a three-dimensional prototype than there is for denying originality to the depiction in two-dimensional form of any other physical object. It by no means follows, however, that that which is an exact and literal reproduction in two-dimensional form of an existing two-dimensional work becomes an original work simply because the process of copying it involves the application of skill and labour. There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work. Of course, even a relatively small alteration or addition quantitatively may, if material, suffice to convert that which is substantially copied from an earlier work into an original work. Whether it does so or not is a question of degree having regard to the quality rather than the quantity of the addition. But copying, per se, however much skill or labour may be devoted to the process, cannot make an original work. A well executed tracing is the result of much labour and skill but remains what it is, a tracing. Moreover it must be borne in mind that the Copyright Act 1956 confers protection on an original work for a generous period. The prolongation of the period of statutory protection by periodic reproduction of the original work with minor alterations is an operation which requires to be scrutinized with some caution to ensure that that for which protection is claimed really is an original artistic work.

Thus far, there is not enough material for this court to have a basis for coming to a finding of fact that the label meets the requirement of originality and sufficiency of effort within the meaning of s 7 of the Copyright Act 1987. The defendant's defence gleaned from encls 11 and 19 may be stated thus:

(1) Simply put, the defendant has categorically put in issue the plaintiff's ownership of the copyright in the label and the eligibility of the label for copyright protection. In Atkin's *Encyclopaedia of Court Forms*, in the title civil proceedings (2nd Ed) (Vol 12, 1986 issue), several germane passages appear at p 430 which merit reproduction:

> It is not necessary for the plaintiff in his statement of claim to allege any facts upon which he relies to prove the existence of copyright in the work or his title to the copyright, since these matters are presumed until put in issue. It is common practice, however, to allege such facts, as the defendant frequently puts such matters in issue.
>
> In pleading any act of direct infringement, it should be alleged that the act has been done 'without the licence' of the owner of the copyright, since it is only in such a case that it constitutes an infringement.
>
> If, however, the defence puts either of these matters in issue, particulars will be ordered of the matters relied upon by the plaintiff as establishing the subsistence of copyright in the work or, as the case may be, his title to such copyright. In appropriate cases, facts may be initially pleaded or set forth in such particulars designed to bring into operation other statutory presumptions.

It is significant to note that the plaintiff fails to provide particulars of originality either in its statement of claim or in its reply.

(2) There were facts which were peculiarly within the knowledge of the plaintiff and the defendant was unable to verify those facts at this point of time. It was the defendant's stand that they were unable, at this juncture, to rebut the plaintiff's averment as to its ownership of the alleged copyright in the label as well as the existence of such copyright. There was a concerted attempt by the defendant to show the existence of triable issues within the ambit and scope of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400. Indeed the facts surrounding the commission of the works to Tom Graphic Studio particularly the nature and scope of the engagement, the amount of time, skill, labour that were put in and whether there were any limiting conditions in the contract of engagement between Tom Graphic Studio and the plaintiff were matters peculiarly within the plaintiff's knowledge. In my judgment, these are triable issues that will hinder the plaintiff's application for summary judgment under O 14 of the RHC. It was obvious upon scrutiny of the affidavits that the defendant was severely disadvantaged in not being able to assess the evidence which the plaintiff had placed before this court. This was a classical *Miles v Bull* situation where the affidavits revealed that there were some other reasons for a trial. Triable issues were also established in these cases:

(a) In *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 83 where the defendants there raised an issue of genuineness as to their signatures in a guarantee agreement, it was held to be sufficient to amount to a triable issue.

(b) In *SM Appaduray & Anor v R Ananda* [1982] 1 MLJ 292, the court there held that the defendant's challenge to the accuracy of the survey in respect of the land encroachment amounted to a triable issue.

(c) In *Koh Siak Poo v Perkayuan OKS Sdn Bhd* [1988] 3 MLJ 224 where the defendant alleged that there was a contemporaneous oral agreement in respect of a payment due to the plaintiff, being a lesser amount than the sum claimed, the court there held that the alleged oral agreement which was not inconsistent with the terms of the document was admissible in evidence under s 92(b) and (f) of the Evidence Act 1950 and that the defendant had raised triable issues which should not be disposed of under O 14 of the RHC.

In my judgment, this is a fit case for a full blown trial. Interrogatories, discovery and cross-examination would be made available once the case goes for trial but would be totally shut out if there was summary judgment. This was not a 'clear-cut issue of law' where it would offend the purpose of O 14 if the court refuses to dispose of it (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 at p 184).

I will now examine the reliefs prayed for by the plaintiff in encl 9.

Injunctive relief

It is apparent from the affidavit evidence that the defendant has ceased to apply the alleged infringing label to its products even prior to the commencement of the present suit. There was hardly any dispute as to this. The purported acts of infringement and/or the entrapment purchases which the plaintiff had made occurred sometime in May and June 1997. It is trite law that the court will not act in vain. The court too will not grant injunctions which have no real value. I have said elsewhere that an injunction looks to the future. The future is what that matters. An injunction is an order of the court directing in clear language a party to litigation to do or refrain from doing an act or a particular act (*Seaward v Paterson* [1897] 1 Ch 545; *Marengo v Daily Sketch & Sunday Graphic Ltd* [1948] 1 All ER 406; *Attorney General v Newspaper Publishing* [1987] 3 All ER 276; and *Chelsea Man Menswear v Chelsea Girl (No 2)* [1988] FSR 217). The law of injunctions is saddled with an over-general propositions that require qualification in certain areas — particularly in its application. In the context of an intellectual property, an injunction is almost always prohibitory in nature, as opposed to mandatory simply because it enjoins the threatened commission or continuance of wrongful acts (24 *Halsbury's Laws of England*, (4th Ed) para 932). The injunction can be granted after a trial establishing infringement of the plaintiff's right and if that happens it is called 'final' or 'perpetual'. It may however be sought in 'interlocutory form', not so much as to enforce an established right but rather to maintain the status quo until a trial of the merits can take place. Of equal importance to remember is that as disobedience may lead to imprisonment, an injunction must be expressed in exact terms so that the defendant knows precisely what he must do, or refrain from doing (*Redland Bricks Ltd v Morris & Anor* [1970] AC 652; and *PA Thomas & Co v Mould & Ors* [1968] 2 QB 913 at p 923). It is for this reason that the court does not grant an injunction which is vague and indeterminate in scope and width. The plaintiff in the present case seeks an injunction to injunct the defendant from infringing its copyright in the label or any part thereof in any manner or form. In

copyright law, an exact copy or a substantial taking amounts to an infringement of copyright. What constitutes a substantial taking is basically a question of fact and degree in each particular case. Lord Reid in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 especially at p 276 of the report remarked that 'the question whether the defendant has copied a substantial part depends much more on the quality than the quantity of what he has taken'. It is important to remember that both the plaintiff and the defendant are in the same business of manufacturing and dealing in floor cleaners. Our copyright law does not restrain the parties from engaging in the same business. But when there is an allegation of an infringement of copyright, the best anecdote would be a trial. It is only at the trial proper that the issue of substantial taking can be resolved by the court and not at this summary stage.

An account of profits

It was the defendant's stand that the plaintiff was not entitled to the grant of an account of profits. It is not out of place to mention that an account of profits is strictly an equitable remedy and it is not aimed at inflicting punishment on the defendant. As an equitable remedy, it is incidental to the right of an injunction which the plaintiff seeks for (*Hogg v Kirby* (1803) 8 Ves 215; *Grimson v Eyre* (1804) 9 Ves 341 at p 346; *Baily v Taylor* (1829) 1 Russ & M 73; *Sheriff v Coates* (1830) 1 Russ & M 159; and *Kelly v Hooper* (1840) 4 Jur 21). The case of *Delfe v Delamotte* (1857) 3 K & J 581 lays down the proposition that the account is in relation to the net profits, like for an example, in relation to the sale price of the infringing article it must be less the manufacturing and delivery costs (*My Kinda Town v Soll & Grunts Investments* [1983] RPC 15 at p 49; *House of Spring Gardens Ltd v Point Blank Ltd* [1985] FSR 327; *Potton Ltd v Yorkclose Ltd* [1990] FSR 11; and *Van Camp Chocolates Ltd v Aulesebrooks Ltd* [1984] 1 NZLR 354). A plaintiff cannot claim for damages and for an account of profits. A plaintiff is entitled to opt for either damages or for an account of profits.

The plaintiff here sought for an account of profits on all sums received by the defendant in consequence of the alleged infringement of the purported copyright. If the plaintiff here sought for the profits made by the defendant in pursuance of the sales of its 'Leo Floor Clean' carrying the alleged infringing label, then it was an unjust and an inequitable move for the following reasons:

(a) The plaintiff merely expended RM1,919.15 on both the front and back labels of the Super Active Floor Kleen and the plaintiff alleged that the defendant had infringed the copyright in the back label only.

(b) Customers purchase floor cleaners based on its brand, price and quality and not on the directions contained on the back labels of those floor cleaners. The defendant's floor detergent retailed for a substantially lower price than that of the plaintiff's.

For these reasons, it would be wholly disproportionate to the injury sustained by the plaintiff for the alleged infringement of its literary copyright in the event the defendant was ordered to provide an account of profits. This was the submission of Miss Ooi Huey Ling for the defendant.

It must not be forgotten that as a corollary to an injunction the court might order a defendant to account to the plaintiff for profits made from wrong-doing such as the infringement of its literary copyright. This was an acceptable practice and treated as such by Lord Eldon in *Hogg v Kirby*. It must be remembered that under this head it is not a notional computation as is the case with damages but rather an investigation of actual accounts which may certainly afford the plaintiff a sight of the customers' names and other information about the defendant. Undeniably, it is a laborious and expensive procedure and it is hardly, if not infrequently, resorted to. *Peter Pan Mfg Corp Ltd v Corsets Silhouette* [1963] 3 All ER 402 establishes the principle that if the protected subject-matter is part and parcel of the article sold, or a mark used to sell it, the plaintiff is entitled to the whole profit as such. By comparison in a trade mark case, the plaintiff is entitled to the profit on each item wrongly sold and the plaintiff need not have to prove that the sale was to a deceived customer (*Lever v Goodwin* (1887) 36 Ch D 1). With the benefit of hindsight, it is far better to compensate the plaintiff under this head than for damages especially when the defendant has been making huge profits that the plaintiff would not himself have made. However, since an account of profits is discretionary in nature, the innocence of the defendant may always be a reason for refusing it as exemplified by the case of *Seager v Copydex* [1967] 2 All ER 415.

Being a laborious procedure, the remedy under this head should be resorted to after a full trial.

Full discovery

It was the defendant's stand that there ought not to be a relief under this head as it did not involve the records of the defendant but rather that of third parties whose records the defendant had no access nor control. I wholeheartedly agree with this submission.

Public apology

This remedy is unknown in copyright law.

Conclusion

The brunt of the plaintiff's complaint was the defendant's alleged infringement in the plaintiff's alleged literary copyright of the back label of its 'Super Active Kleen Floor'. The plaintiff recognizes that copyright protects not ideas but the expression of ideas. The influence of such labels on a customer, especially the back labels, are rarely the selling point of the product. The discerning consumer would be more influenced by the front label of a product as it would be eye catching and attractive. All these however can only be appreciated after a full trial when the products are produced and scrutinized by this court. I am aware of the decision of his Lordship Gunn Chit Tuan J (as he then was) in *Longman Malaysia Sdn Bhd v Pustaka Delta Pelajaran Sdn Bhd* [1987] 2 MLJ 359 where at p 364 of the judgment his Lordship said:

A The learned author of that textbook suggested that the determination of what is a substantial part might involve delicate questions of degree. But nevertheless, there are a number of factors which may assist in this process. According to the learned author, the originality of the part taken may be a very relevant consideration. If the part taken represents the application of a high degree of skill and labour on the part of the author, it may be regarded B as substantial although comparatively slight in quantitative terms. On the other hand, where the part taken involves little orginality, it may not be regarded as substantial even though quantitatively it may form quite a large part of the work.

A second relevant factor, according to the learned author, is the object or purpose which lies behind the taking and the use which is made of the C part taken. Thus, if the purpose of the copyist is the same as that of the author of the original, this may lead the court to hold that the part taken is substantial. This is particularly so, where the copyist is thereby relieved of the necessity of using his own skill and labour and is enabled to take a free ride on the efforts of the original author. Thus it seems the courts will readily reach the conclusion that a substantial part has been taken when this D is done *animo furandi*, ie with the intention on the part of the copyist to take from the original work for the purpose of saving himself time and labour. The third relevant factor, according to the learned author, is whether the defendant's use of the part taken will be such as to interfere with the sales of the original or to compete with it. In this case, Mr Wong submitted that the illustrations and tables are a very vital part of the plaintiff's book P1, and E the skill was involved in producing the substantial part which was copied in the defendant's book (D11) in which there was no mental effort on the part of the defendant, and I might add, on the part of the authors and artist or artists of the manuscript of D11. (Emphasis added.)

The observations of his Lordship Gunn Chit Tuan J (as he then was) were F made in the context of a full trial, something which was missing in the present case. Here the trial has yet to proceed.

Incidentally, the principles of law distilled from *Macmillan & Co Ltd v Cooper* (1923–1924) 40 LT 186 and *Ravenscroft v Herbert & New English Library Ltd* [1980] RPC 193 are germane and applicable to the present case but these two cases were decided after a lengthy trial. This sets them G apart from the present case.

For the reasons adumbrated above, encl 9 was dismissed with costs. Expediency was called for in this case. In view of the stand I took in this case, an early trial was ordered provided the parties have complied with the other provisions of the RHC particularly as to discovery and inspection H of documents (O 24 of the RHC), summons for directions (O 25 of the RHC), interrogatories (O 26 of the RHC), etc. The date for hearing of the present case in open court was accordingly scheduled for three days beginning from 8 June 1998 till 10 June 1998.

Plaintiff's application dismissed.

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Reported by David Lai